(1)

No. 961645 JAN 15 1997

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term - 1996

FLOYD AUTEN ELECTRIC, INC.,
a California Corporation,

Petitioner,

-vs-

BERRY CONSTRUCTION, INC., a California Corporation; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 440,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State of California

---

PETITION FOR WRIT OF CERTIORARI

JACQUE BOYLE
Attorney at Law
California State Bar No. 20912
201 No. Figueroa St., Suite 1425
Los Angeles, California 90012
(213) 622-7116

Attorney for Petitioner

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SUPREME COURT, U.S.

QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner denied his due process rights guaranteed by the 14th Amendment of the United States Constitution where he was denied his right to trial by jury guaranteed by the California Constitution, in circumstances contra to, and in violation of established law in California?

2. Did the California Courts deny Petitioner due process of law and equal protection of law as guaranteed by the 14th Amendment of the United States Constitution when the trial court, in the exercise of proven prejudice against Petitioner and bias in favor of Respondents BERRY and IBEW, abused its discretion, and contrary to law and precedent, denied petitioner a jury trial, and decided summary adjudication of issues against petitioner contrary to, and in violation of, established law in California?

3. May the California Courts fail to apply established law to petitioner to deny petitioner its right to a trial by jury, and adversely decide summary judgment issues in error, then decertify (purge) the publication of the Appellate Court's Opinion, by the California Supreme Court, so that all persons in similar circumstances will be assured of their rights to a fair and impartial trial by jury?

PARTIES

Petitioner, FLOYD AUTEN ELECTRIC, INC. (AUTEN), sued BERRY for breach of its electrical subcontract, claiming its last progress payment due under said subcontract. AUTEN later sued IBEW for interference with Contract and related causes.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 440 (IBEW) sued BERRY claiming third party beneficiary to BERRY's Carpenters Union Contract, claiming damages for BERRY's use of AUTEN, a union, but not AFL-CIO union, member.

BERRY CONSTRUCTION COMPANY, INC. (BERRY) cross-complained against (third-party) AUTEN for indemnity in the event of an adverse Judgment in the IBEW lawsuit.

All lawsuits were joined in this action.

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REFERENCES TO OPINIONS, DECISIONS AND JUDGMENTS OF THE LOWER COURTS

The Lower Court's Minute Order of July 9, 1991, denying Petitioner Auten's Motion To Vacate Waiver of Jury Trial, is attached hereto as Appendix "A".

Appendix "B" sets forth Respondent IBEW's Motion for Summary Judgment and Summary Adjudication of Issues, and specifically sets forth the Issues granted by the Lower Court, Issues number 1 through 5, and denied, Issues number 6 and 7. The Court's Minute Order granting Respondent IBEW's Motion for Summary Adjudication of Issues as to Issues 1, 2, 3, 4, and 5 is attached hereto as Appendix "C".

Appendix "D" sets forth the Lower Court's Statement of Decision, and Appendix "E" is the Judgment entered thereon.

The Opinion of the California Court of Appeal, Fourth Appellate District, Division Two, is attached hereto as Appendix "F", which forms the basis of this Petition for Writ of Certiorari.

The California Court of Appeal's denial of Petitioner's Petition for Rehearing is set forth in Appendix "G".

The California Supreme Court's Order denying review is attached as Appendix "H", noting that three of the Honorable Justices were of the opinion that the Petition should be granted.

JURISDICTION

The lower Court's Judgment was entered May 20, 1992 (Appendix "E").

The Opinion and Decision of the Court of Appeal, Fourth Appellate District, Division Two was filed and entered June 17, 1996 (Appendix "F"), and its Order denying Petitioner's Petition for Rehearing was filed July 10, 1996.

Petitioner's Petition for Review before the California Supreme Court was denied on October 17, 1996, without opinion (Appendix "G").

This Petition for Writ of Certiorari is filed within ninety days from said date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

STATEMENT OF THE CASE

I. Nature of the Action

FLOYD AUTEN ELECTRICAL, INC. (hereinafter "AUTEN") sued BERRY CONSTRUCTION COMPANY (hereinafter "BERRY") for breach of its electrical subcontract with Berry (BERRY-AUTEN Contract), demanding his last payment due thereunder. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 440 (hereinafter "IBEW") sued BERRY for breach of BERRY's agreement with Local Unions affiliated with the United Brotherhood of Carpenters and Joiners of America (Carpenter's Union). The agreement will be referenced herein as BERRY-Carpenters's Contract. IBEW claims to be a third party beneficiary to said contract. BERRY cross-complained against AUTEN for damages it might suffer should IBEW obtain judgment against Berry. AUTEN's cross-complaints are not at issue here.

II. Summary of Material Facts

Floyd Auten is an Electrical Contractor. His company, AUTEN, submitted its bid to BERRY on the subject construction project, as an electrical subcontractor, which bid was accepted. Prior contractual relations between the parties were had under circumstances where AUTEN's affiliation with an independent union, not AFL-CIO, was specifically established (Trial Exhibits J, K, L, M, N and P). The pertinent language of the subject contract, at issue, is as follows:

> "Sub-contractor agrees to have a valid collective bargaining agreement with the appropriate building and construction trade union or unions."

The language following that sentence which mentions "AFL-CIO" is ambiguous and unintelligible, and is claimed by Berry to require Auten to have AFL-CIO labor affiliation.

After the contract was signed and during the Electrical construction by AUTEN, BERRY complained to AUTEN, claiming his use of non-union employees, but did not remove AUTEN from the job, or prevent AUTEN from completing his contractual duties. Later, when BERRY became convinced that AUTEN was "Union", he then complained that AUTEN's union was not AFL-CIO affiliated. AUTEN completed the job in a good and workmanlike manner and received all but the last of the progress payments due him under the subject contract, being in the sum of $86,177.00. AUTEN claims that last payment, interest on such payment, and his attorney's fees of $15,000.00. BERRY defended, claiming that AUTEN breached the BERRY-AUTEN Contract, and claims damages for said alleged breach, based on his claimed potential liability to IBEW (BERRY also claims attorney's fees, even if it is not liable to IBEW).

IBEW claims that the BERRY's Carpenters' Contract affords third party beneficiary status to IBEW, and that BERRY breached that contract by utilizing AUTEN, a union, but not AFL-CIO Union Electrical Subcontractor.

BERRY avoided the language of the controlling sentence of the BERRY-AUTEN contract, and explains the ambiguity of foregoing phrases, by use of extrinsic evidence to alter its contract. IBEW seeks to avoid the language of controlling paragraphs in the Carpenters' agreement to claim third party beneficiary status, and

to extend contract coverage to electrical workers, all by extrinsic evidence. Resolution of that issue by summary proceeding is asserted as clear error here.

III. Proceedings to Date

Petitioner's prior counsel filed an At Issue Memorandum on May 3, 1989, and designated "No" to the "Jury trial requested:" question of that form. The time Trial Setting Conference Order of the case leaves blank "Jury Demanded by" line. Petitioner, through his present counsel, brought his Motion For Order Setting Aside said "waiver of jury trial", on May 18, 1990. At that time, there was no trial date pending. The case was thereafter set for trial on September 23, 1991.

After continuances, on June 22, 1990, said Motion, along with Motions for Summary Judgment and for Summary Adjudication of Issues, was heard, argued, and submitted. Thereafter, on September 20, 1990, the Court issued its decisions and rulings as to all other pending Motions but, for reasons unknown to petitioner, did not make its decision as to petitioner's Motion for Order Setting Aside Waiver of Jury Trial and for Trial by Jury. The Motion was denied a year later. Such denial was not predicated upon any prejudice to either the Court or any party to this action, nor was any reason for denial stated.

Petitioner then filed his Petition for Writ of Mandate with the Court of Appeal, Fourth Appellate District, Division Two, on or about July 19, 1991, to compel trial by jury, which Petition was denied on July 29, 1991. The California Supreme Court did not grant hearing thereafter.

IV. Federal Questions Raised In the Court of Appeal

In the Court of Appeal, Petitioner argued that the Trial Court's rulings were in violation of the Sherman Antitrust Act, 15 U.S.C. §1, and further argued that the denial of a trial by jury was prejudicial error of "Constitutional" magnitude.

In petitioner's Petition for Review to the California Supreme Court, petitioner argued that he was deprived of his Constitutional rights to due process and the equal protection of law, by the Court's denial of its right to a trial by jury.

While not designated as Federal Questions, as such, much of the Argument here submitted was submitted to the California Court of Appeal and the denial of due process and the equal protection of law by the Appellate Court's Opinion and Decision, was a part of petitioner's Petition for Review before the California Supreme Court.

It is further submitted that the California Supreme Court's conduct in denying hearing, but in de-certifying publication (purging) the Appellate Court Decision, to remove the erroneous application of law to Petitioner, was, in itself, a denial of the equal protection of the law to petitioner.

REASONS FOR ALLOWANCE OF WRIT

I. CALIFORNIA COURTS DENIED PETITIONER HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF LAW, BY DENIAL OF A JURY TRIAL.

Here, Petitioner's first counsel inadvertently waived jury trial without Petitioner's knowledge or consent. Petitioner's present counsel, upon substituting into the case, immediately moved to vacate such waiver, and demanded trial by jury. The motion was made some 17 months before trial. The Trial Court Presiding Judge, Philip Schaefer, did not decide the Motion for approximately one year. Then, at the request by Petitioner's counsel, and after telephone conference with all attorneys, denied the Motion. The Motion was timely made, no prejudice to the parties to the action, or the Court, existed, or was alleged or stated by the trial Court as a reason for denial of the Motion (Appendix "A").

The denial of the Motion, and consequential denial of a trial by jury, was a denial of due process and the equal protection of the law, as guaranteed by the 14th Amendment to our Constitution. The California Constitution provides for the right to a trial by jury in the civil arena (California Constitution, Article 1, § 16). Established case law in California held, and still holds, that:

"(Where) ... the (trial) Court did not articulate any inconvenience to it, ... such denial after waiver, where no prejudice is shown to the parties or to the Court, is prejudicial. (Simmons v. Prudential Ins. Co. (1981) 123 Cal.App.3d 833, 177 Cal.Rptr. 37)

In Simmons, supra, the Court also held that the Appellant's participation in the trial, after a jury had been denied, did not preclude her from asserting error in the ruling, on her appeal.

A trial court abuses its discretion, (as a matter of law) when "... relief has been denied, where there has been no prejudice to the other party..." (Winston v. Superior Court, (1987) 196 Cal.App.3d 600 @ 602).

And in Bishop v. Anderson (1980) 101 Cal.App.3d 821, 161 Cal.Rptr. 885, the Appellate Court firmly established that:

> "The denial of a jury trial after waiver where no prejudice is shown to the other party or to the court is prejudicial error (as a matter of law)."

The California Courts' denial of petitioner's right to trial by jury, by their rejection of Simmons and Bishop, supra, constitutes a denial of due process to Petitioner, as such established law has been, and still is, applied to all other litigants in the same or similar circum stances as Petitioner here.

II. PETITIONER DENIED DUE PROCESS AND EQUAL PROTECTION OF LAW BY ABUSE OF DISCRETION AND ERRONEOUS HOLDINGS OF TRIAL COURT JUDGE.

A. Bias of Judge Schaefer in Pre-trial Proceedings.

Petitioner has argued Judge Schaefer's bias in the exercise and abuse of his discretion to deny Petitioner's Motion to Set Aside jury waiver. That bias

is further evident in the proceedings granting IBEW's Motion for Summary Adjudication of Issues.

IBEW filed its Motion for Summary Judgment and Summary Adjudication of Issues. The same was opposed and opposition briefed by Petitioner's counsel. The matter was argued and submitted, and the lower Court, on June 22, 1992, granted items 1, 2,, 3, 4 and 5 of IBEW'S Motion for Summary Adjudication of Issues (Appendix "C"), which issues were as follows:

Issue 1. Berry was signatory... to agreement with the Carpenters Union.

Issue 2. Berry was the General Contractor (on the subject job site).

Issue 3. The Berry Carpenters agreement obligated Berry to sub-contract electrical ... work to sub-contractors signatory to IBEW... on the (subject) job site.

Issue 4. Berry breached its agreement with the Carpenters Union when it sub-contracted...(with AUTEN).

Issue 5: Plaintiff (IBEW) was the intended third party beneficiary of the Berry/Carpenters Agreement, specifically the subcontracting clause as it related to electrical construction work to be performed on the job site.

This was error, as was argued by BERRY's and AUTEN's opposition papers. The granting of said Motion and its error, must be upheld or denied on the opposition and moving papers filed in connection therewith. Such documents will not be repeated verbatim here, but are set forth

in the record of this case, in the Clerk's Transcript, generally Volume IV thereof.

However, the errors were underscored in the following particulars: First, the Berry Carpenter's Union Contract, to which IBEW claims third party beneficiary status, does not name or suggest such status by its terms, or by any reasonable inference to be drawn therefrom. Instead, IBEW by parole evidence, alter said Carpenters Union Contract by way of Declaration of an individual who refers to intentions of the parties in drafting the contract. An attempt to alter the terms of that document by extrinsic evidence. Such strained concept of the third party beneficiary theory is against established case law.

The evidence before Judge Schaefer in 1992, and the absence of evidence before the trial Court, to show such third party beneficiary status, underscores the error of the Judgment of this case, because, without such third party beneficiary status, IBEW can have no judgment against Berry, and Berry can have no judgment against Auten.

B. <u>Mandatory Settlement Conference Procedure Denied Appellant Due Process.</u>

The Mandatory Settlement Conference here effectively denied Appellant a fair trial on the merits. The subsequent conduct and efforts of the Mandatory Settlement Conference Judge to influence the Judgment in this case, violates the principals of due process and equal protection of the law.

The application of the Mandatory Settlement Conference process here denied AUTEN due process of law, its

Constitutional right to due process and the equal protection of the law afforded by both the State of California and the United States Constitutions.

C. **Bias of Judge J. Lewis Liesch.**

The prejudice of the eventual trial Judge in this case can be shown by circumstantial evidence of his strong personal relationship with Judge Philip Schaefer, for which we will request the Court to take Judicial Notice, the disappearance of the Note and Envelope from Judge Schaefer to the trial Judge, urging Judgment against AUTEN, and the trial Judge's rulings, decisions and orders, as well as the Judgment itself.

As to the first point, Petitioner requested the Appellate Court to take judicial notice of the reelection campaign of Judge Schaefer, and Judge Liesch's public endorsement of Judge Schaefer, as well as their association as Judges in the same Court for many years.

The subject Note (Lower Court's Exhibit 1), was last in the possession of Judge Schaefer, when, according to his Clerk he placed it back in the file (Reference is made to the Declaration of Karen Enderson in support of Appellant's Motion to reconstruct Exhibit 1). Addressed to the Trial Judge, the Note then is lost from the file. Under these circumstances, it is reasonable to infer that Judge Liesch, having received the Note and being addressed to him, would have noted its contents and then discarded the Note. In any event, if Judge Schaefer was inclined to place such a note in the file, he would be equally inclined to convey his message to his colleague, Judge Liesch.

As to Judge Liesch's rulings, orders and decisions, he begins the Trial by dismissing two of AUTEN's three causes of action, because BERRY's counsel requested such dismissal, all without notice to AUTEN or authority for such dismissal.

Further prejudice is shown from the Statement of Decision and Judgment (Appendix "D" and "E", given without evidence and against law as is herein argued.

D. Further Trial Rulings in Error.

Judge Liesch dismissed AUTEN's several causes of action based on the Cartwright Act and Unfair Trade Practices. This was error, as such causes of action were properly before the Court.

IBEW's conduct was directed toward restricting and limiting AUTEN's business, and preventing AUTEN from freely competing in the electrical contracting business in the general geographical area involved in this lawsuit.

As an affiliate of the AFL-CIO labor union, a national association, the conduct here involved would be within the Sherman Antitrust Act, 15 U.S.C. §1, "...prohibiting restraint of trade or commerce...or (2) conspiracy...to monopolize any part of the trade or commerce among the several States". (See U.S. v. Columbia Steel, (1948) 334 U.S. 945).

While the transaction involved may not necessarily have been in interstate commerce, the thrust of IBEW's conduct would be to benefit the AFL-CIO National Organization. Nevertheless, State law parallels the Sherman Antitrust Act (The Cartwright Act, California Business and

Professions Code §16700, et seq.). Labor, skilled or unskilled, is ordinarily not within the purview of the Cartwright act, but that exception is not applicable where the purpose (of the conduct) is not a legitimate labor objective (O'Shea v. Tile Layers Union (1957) 155 C.A.2d 373; 318 P.2d 102).

Whether interstate or intrastate, the conduct of IBEW here is clearly calculated to impede and inhibit AUTEN in the conduct of its business. IBEW, albeit indirectly, sought to require AUTEN to join an AFL-CIO affiliated union, or pay money, on the basis of a third party beneficiary argument as to a contract between Berry and a Carpenters' Union, totally beyond Auten's knowledge. It would not have been possible for AUTEN to have reviewed that Contract prior to his performance under his sub-contract with Berry. but had he done so, he would have rightly concluded that by the terms of that agreement, AUTEN's services to Berry could not have subjected Berry to any claim of breach by any third party, as the Berry/Carpenter's Union Contract never required Berry to use an Electrical Subcontractor with an AFL-CIO affiliation. IBEW's attempt to change the terms of that contract by the use of extrinsic evidence is not only unauthorized in law, but invalid here, as has been previously argued.

Judge Liesch's Order dismissing AUTEN's Second and Third Causes of Action, brought within the Cartwright Act, and seeking redress for unfair trade practices, were State law claims, and their abrupt dismissal was a violation of AUTEN's right to a trial on the merits and a violation of his due process rights.

3. Judgment for IBEW against Berry Not Supported by Evidence and is Against Law.

A. IBEW Fails to Establish Third Party Beneficiary Status.

The issue of IBEW's Third-Party Beneficiary Status was substantially resolved against AUTEN by Judge Schaefer's granting of IBEW's Motion for Summary Adjudication of Issues, as hereinabove argued. However, IBEW never, at any time, offered any evidence to support its Third Party-Beneficiary status claim to the BERRY/ Carpenters Union Contract. IBEW is neither named, nor its trade suggested by the terms of that Contract. IBEW, in its successful Motion for Summary Adjudication of Issues merely argued that the terms of that Contract were modified by subsequent unilateral acts and conduct of third parties by parole evidence (CT Vol 3 pg 614), impermissible in this case (Hotchkiss v. Nelson R. Thomas Agency (1950) 96 C.A.2d 154). And Civil Code §1559 provides as follows:

> "A contract, made expressly for the benefit of a third person, may be enforced by him..."

The third person seeking to enforce such a contract cannot prevail if he is only incidently or remotely benefitted (Chutes v. Cheney(1954) 123 C.A.2d 256).

Certainly BERRY never intended to benefit IBEW in its execution of the Carpenters Union Contract. And the absence of such intent further mitigates against IBEW's claim of third-party beneficiary status. (Southern Cal. Gas Co. v. ABC Const. Co., (1962) 204 C.A. 811; 22 C.R.

540).

IBEW was neither an intended nor incidental beneficiary to the BERRY/Carpenters Union Contract. In Gilbert Financial v. Steelform, etc. 82 C.A.3d 65; 145 C.R. 448, the Court affirmed, in substance, that third-party beneficiary status may be found if the contract is expressly or more than incidentally for the benefit of the third party. The BERRY/Carpenters Union Contract was certainly not expressly, nor even incidentally, for the benefit of IBEW.

III. APPELLATE DECISION UPHOLDING DENIAL OF JURY TRIAL AGAINST LAW, AND DENIED PETITIONER EQUAL PROTECTION OF LAW.

Beginning in 1971, the California Supreme Court has ordered "decertification" (or "depublication" or "nonpublication") of many court of appeal opinions which had been certified for publication by the court of appeal. The order is made because opinion is thought to contain erroneous or mistaken statements of law and should not be citable as a precedent. To grant a hearing and take the entire case over in all such situations would be impossible in the light of the workload of the Supreme Court...."

Here, the Court of Appeal disapproved "...We decline to follow ..." Simmons and Bishop, supra. However, such holding, although not reversed by the Supreme Court, was decertified, rendering the Appellate decision no longer authority in California, and reinstating or affirming Simmons and Bishop, supra.

This leaves Petitioner as the only entity in California who was denied a

trial by jury in the circumstances of this case, both pre and post this AUTEN trial and appeal, constituting a denial of equal protection of the law to AUTEN, by definition.

CONCLUSION

Petitioner prays that this Court grant Certiorari, review this case, and render its decision herein, reversing the California Trial and Appellate Court Decision, and the California Supreme Court's denial of hearing, and remanding the case to the California Courts for a jury trial on the merits, on all issues of the case.

Dated: January 15, 1997

Respectfully submitted,

JACQUE BOYLE
Attorney for Petitioner AUTEN

APPENDIX "A"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

ACIS Case No.: JUDGE: PHILIP E. SCHAEFER

DATE: 7/9/91 TIME:
CASE NO.: RCV 40207 CLERK: KAREN ENDERSON

DEPT.: RC-1 BAILIFF: -------
REPORTER: --------

CASE TITLE: IBEW -v- BERRY CONSTRUCTION CO, ETAL

NATURE OF PROCEEDINGS:

XX RULING ON DEFTS (AUTEN) MOTION TO VACATE WAIVER OF JURY TRIAL

MINUTE ORDER:

Defts (Auaten) [sic] Motion to Vacate Waiver of Jury Trial is denied. The Court finds that Deft Auten expressly waived their right to a jury trial in this case on two occasions: 1) the Auten At-Issue Memorandum and 2) orally at the Trial Setting Conference.

This is not a case of inadvertent waiver as discussed by the Court in Wharton -vs- Superior Court on 6/14/91 (Court of Appeals, 2nd District, Div. 6).

Courtroom Clerk to give notice of this ruling.

cc: Ray Van der Nat, Esq.
Jacque Boyle, Esq.
Robert Schauer, Esq.

I certify that copies of the above Order were mailed to counsel of record as indicated on July 9, 1991.

Karen M. Enderson
Court Clerk

APPENDIX "B"

RAY VAN DER NAT
a member of Law Offices of
Ray Van der Nat
A Professional Corporation
1626 Beverly Boulevard
Los Angeles, California 90026
Telephone: 213-483-4222

FILED 5/18/90

Attorney for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 440,	)
Plaintiff	)
VS	)
BERRY CONSTRUCTION, COMPANY, INC., et al.,	)
Defendant.	)
AND RELATED CROSS-ACTIONS.	)

1) **NOTICE OF MOTION;**
2) **MOTION FOR SUMMARY JUDGMENT**
3) **MOTION FOR SUMMARY ADJUDICATION OF ISSUES**
4) **MEMORANDUM OF POINTS AND AUTHORITIES**

[filed concurrently with separate statement of undisputed facts and declaration of Bob Carter in support thereof]

DATE: JUNE 1, 1990 TIME: 8:30 A.M. DEPT:

TO ALL THE PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 1, 1990 in Department 1 of the above entitled Court at 8:30 A.M. or as soon thereafter as the matter may be heard, Plaintiff, International Brotherhood of Electrical Workers Local Union No. 440, will and does hereby move for Summary Judgement, or in the alternative for Summary Adjudication of Issues against Defendant, Berry Construction, Inc.

...

DATED: May 18, 1990

Ray Van der Nat

Ray Van der Nat
Attorney for Plaintiff
Electricians Local
Union #440

...

C. THE ISSUES TO BE SUMMARILY ADJUDICATED

Plaintiff submits that the following issues may be summarily decided as a result of this Memorandum, the Statement of Undisputed Facts and Declarations and Exhibits filed in support thereof.

Issue No. 1: Berry Construction, Inc. was signatory and bound to the 1983-1986 Collective Bargaining Agreement with the Carpenters Union.

Issue No. 2: Berry was the general contractor for the Construction of a new elementary school in La Qunita (the job site).

Issue No. 3: The Berry/Carpenters Agreement obligated Berry to subcontract electrical installation work to an elec-

trical subcontractor signatory to Plaintiff when electrical construction work was to be performed on the job site.

Issue No. 4: Berry breached its agreement with the Carpenters when it subcontracted electrical construction work on the job site to Floyd Auten Electric, Inc.

Issue No. 5: Plaintiff was the intended third party beneficiary of the Berry/ Carpenters Agreement, specifically the subcontracting clause as it related to electrical construction work to be performed at the job site.

Issue No. 6: As a result of Berry's breach of the Carpenters Agreement, Plaintiffs' members were damaged and lost 5,761.5 man hours of electrical construction work at the job site.

Issue No. 7: As a result of Berry's breach of the Carpenters Agreement, Plaintiff members were damaged and lost $147,520.92 in wages and fringe benefit contributions. ...

DATED: May 18, 1990 Ray Van der Nat

Ray Van der Nat
Attorney for Plaintiff

[Note: "..." denotes omitted extraneous matters in IBEW's Motion, not involved herein.]

APPENDIX "C"

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN BERNARDINO**

MINUTE ORDER -- 3

ACIS Case No.: JUDGE: PHILIP E. SCHAEFER
DATE: 06/22/90 TIME: 08:30 AM
CASE NO.: RCV 40207 CLERK: MICHAEL RICTER

DEPT.: RC-1 BAILIFF: Russ Covington
REPORTER: Sandra Wright

Counsel: Ray Van Der Nat
Covington & Crowe by Rbt. Shauer
Jacque Boyle

CASE TITLE: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION #440 -v- BERRY CONSTRUCTION COMPANY, INC.,

NATURE OF PROCEEDINGS: ...

LAW AND MOTION ...
42012 /x/ Hearing on: PLTF (INTER BROTHER HOOD) MOTION FOR SUMMARY JUDGMENT; MOTION FOR SUMMARY ADJUDICATION OF ISSUES

...

RULING ISSUED AS FOLLOWS: ...

400001 /x/ Other: Motion granted as to items 1-2-3-4-5 and denied as to items 6-7

...

41014 / / Notice Waived /x/ Notice to be given by Plaintiff ...

[Note: "..." denotes omitted extraneous matters on pre-printed Court form, not involved herein.]

APPENDIX "D"

ROBERT F. SCHAUER
STATE BAR NO. 48614
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Attorneys at Law
1131 West Sixth Street
Post Office Box 1515
Ontario, California 91762

ORIGINAL FILED
San Bernardino County
MAY 20 1992
County Clerk West District

Attorneys for Berry Construction, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO
WEST DISTRICT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 440,	)
Plaintiff	)
v.	)
BERRY CONSTRUCTION, COMPANY, INC., et al.,	)
Defendant.	)
AND RELATED CROSS-ACTIONS.	)

STATEMENT OF DECISION
[CCP § 632, California Rule of Court 232]

The above-entitled action came on regularly for trial on November 13 and 14, 1991, December 4, 5, 9, 17, 1991, February 18, 1992, and March 24, 1992, in Department RC-5 of the above entitled Court, The Honorable J. Lewis Liesch, Judge presiding without a jury, a jury having been waived. Ray Van Der Nat, Esq., appeared as counsel for Plaintiff and Cross-Defendant, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 440 ("IBEW"), Covington &

Crowe by Robert F. Schauer, Esq., appeared as counsel for Defendant, Cross-complainant and Cross-Defendant, BERRY CONSTRUCTION, INC. ("Berry"), and Jacque Boyle, Esq., appeared as counsel for Plaintiff, Cross-Complainant and Cross-Defendant, FLOYD AUTEN ELECTRIC, INC. ("Auten").

After documentary evidence was introduced on behalf of the respective parties and the cause, which was previously consolidated with Case Numbers RCV045577 and RCV051095, was argued and submitted for decision. The Court having considered the evidence and heard the arguments of counsel and being fully advised and recognizing that the Court previously granted, in part, IBEW's Motion for Summary Adjudication of Issues, and after hearing on April 28, 1992, to settle issues involving the Statement of Decision, the Court now renders the following Statement of Decision:

1. With regard to the issue of damages in favor of IBEW and against Berry, the Court's decision is that IBEW is entitled to recover as damages against Berry monies that would have been paid as fringe benefits consisting of pension, health and welfare, training, National Electrical Industrial Fund ("NEIF") and National Electrical Benefit Fund ("NEBF") for the hours worked on the work of improvement by employees of Auten.

A. The Court has based its decision on the following facts:

(1) Auten's employees, in performing electrical work on the work of improvement, performed 5,712.50 regular hours of work and 39 overtime hours of

work (see Exhibit 5[1]

(2) The fringe benefits for health and welfare, pension, training, NEIF, NEBF for the number of hours worked by Auten's employees on the work of improvement total $34,365.00[2] (see Exhibit 5).

B. The legal basis for the Court's decision is the prior Order granting, in part, IBEW's Summary Adjudication of Issues and that Berry is required to pay as damages to IBEW the fringe benefits for health and welfare, pension, training, NEIF, NEBF for the number of man hours of work performed by Auten's employees on the work of improvement.

2. With regard to the issue of whether Auten breached the Subcontract Agreement entered into with Berry, dated June 11, 1986 (Exhibit 7), and Auten's obligation to indemnify Berry, the Court's decision is that Auten did breach the Subcontract Agreement for failing to be signatory and bound to a Collective Bargaining Agreement with the International Brotherhood of Electrical Workers Local Union No. 440 and Auten must indemnify Berry for damages sustained by Berry for the breach.

A. The Court based its decision on the following facts:

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[1] All references to exhibits are to exhibits admitted into evidence at the trial of this action.

[2] All damages calculated are rounded down to the nearest dollar.

(1) The Subcontract Agreement is construed and is interpreted by the Court to require that Auten have a valid collective bargaining agreement with an AFL-CIO affiliated union, which the Court finds to be the International Brotherhood of Electrical Workers Local Union No. 440 and with regard to Auten's work on the subject work of improvement.

(2) The Subcontract Agreement requires Auten to indemnify and hold Berry harmless from all claims, demands, lawsuits, costs, expenses, obligations, liabilities, damages including interest, penalties and reasonable attorneys' fees that Berry has incurred as a result of Auten's breach of any term, covenant or obligation under the Subcontract Agreement.

(3) Auten breached the Subcontract Agreement for failing to be signatory and bound to a collective bargaining agreement with the International Brotherhood of Electrical Workers Local Union No. 440 AFL-CIO and is required to indemnify Berry for all damages Berry incurs to IBEW, plus the reasonable attorneys' fees incurred by Berry.

(4) Berry has performed all of the terms, conditions, covenants and promises on Berry's part to be performed under the Subcontract Agreement and Berry has not breached the Subcontract Agreement.

(5) Berry is the prevailing party as between Berry and Auten in this action and is entitled under the Subcontract Agreement to recover its costs and reasonable attorneys' fees incurred by it in this action.

(6) Berry at all times held a valid State of California contractor's license (Exhibit 33).

B. The legal basis for the Court's decision is that the Subcontract Agreement is construed and interpreted by the Court to require Auten to have in effect a valid collective bargaining agreement with an AFL-CIO affiliated union with respect to Auten's work performed on the work of improvement. Auten did not have a collective bargaining agreement with an AFL-CIO affiliated union.

3. With regard to the issue of accounting for money otherwise owned between Berry and Auten under the Subcontract Agreement, the Court's decision is that for monies otherwise owing by Berry to Auten, Berry is entitled to deduct as an offset from amounts otherwise owing to Auten and is entitled to recover from Auten the sum of $34,365.00 which Berry is required to pay to IBEW, plus attorneys' fees incurred by Berry.

A. The Court has based its decision on the following facts:

(1) But for Auten's breach of the Subcontract Agreement there would have been owing by Berry to Auten for work performed by Auten on the work of improvement the sum of $64,757.00 (see Exhibits 34, 35, 36) from which Berry as the prevailing party is entitled to deduct reasonable attorneys' fees in the sum of $39,466.00 incurred by Berry in this action, leaving a net amount otherwise due Auten of $25,291.00.

B. The legal basis for the Court's decision is that Berry is entitled

to apply the balance on its account with Auten, after the deduction for attorneys' fees, in the sum of $25,291.00, towards monies owing by Berry to IBEW, leaving an affirmative balance due by Auten to Berry in the amount of $9,074.00, plus any costs Berry is required to pay to IBEW (amount owing from Berry to IBEW, $34,365.00, minus amount left on account between Berry and Auten, $25,291.00, equals $9,074.00).

4. With regard to the issue of whether Auten was duly licensed as a contractor at all times during Auten's performance of the Subcontract Agreement on the work of improvement, the Court's decision is that Auten was not licensed at all times during its performance of the Subcontract Agreement.

A. The Court has based its decision on the following facts:

(1) Auten's contractor's license expired on October 31, 1986, and was not renewed until November 13, 1986, which was during the time Auten performed work on the work of improvement.

B. The legal basis for the Court's decision is that:

(1) Auten was required to be licensed at all times during the performance of the Subcontract Agreement with Berry and that the judicial doctrine of substantial compliance does not apply to the licensure requirements of Auten.

(2) Notwithstanding as to whether the judicial doctrine of substantial compliance applies or not, there has been a failure of proof on behalf of Auten to show and establish that Auten substantial-

ly complied with the licensure requirements.

WHEREFORE, Judgment is hereby ordered in favor of IBEW to be entered as follows:

1. IBEW shall have Judgment and recover from Berry the sum of $34,365.00; and,

WHEREFORE, because of Auten's breach of the Subcontract Agreement, as set forth above, and for the independent reason that Auten was not licensed at all times during Auten's performance of the Subcontract Agreement, Judgment is hereby ordered in favor of BERRY to be entered as follows:

1. After offsetting amounts otherwise due Auten by Berry, Berry shall have an affirmative Judgment and recover from Auten the sum of $9,074.00, plus costs of suit;

2. The Cross-Complaint of Auten in Case Number RCV040207 shall be dismissed, the Complaint of Auten in Case Number RCV045577 dismissed, and the Complaint of Auten in Case Number RCV051095 is dismissed.

DATED: May 20, 1992

J. Lewis Liesch
THE HONORABLE J. LEWIS LIESCH

APPENDIX "E"

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Filed - West District
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By: Renee M. Maddux, Deputy

Attorneys for Berry Construction, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO
WEST DISTRICT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 440,	)
Plaintiff	)
v.	)
BERRY CONSTRUCTION, COMPANY, INC., et al.,	)
Defendant.	)
AND RELATED CROSS-ACTIONS.	)

JUDGMENT

The above-entitled action came on regularly for trial on November 13 and 14, 1991, December 4, 5, 9, 17, 1991, February 18, 1992, and March 24, 1992, in Department RC-5 of the above entitled Court, The Honorable J. Lewis Liesch, Judge presiding without a jury, a jury having been waived. Ray Van Der Nat, Esq., appeared as counsel for Plaintiff and Cross-Defendant, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 440 ("IBEW"), Covington & Crowe by Robert F. Schauer, Esq., appeared

as counsel for Defendant, Cross-complainant and Cross-Defendant, BERRY CONSTRUCTION, INC. ("Berry"), and Jacque Boyle, Esq., appeared as counsel for Plaintiff, Cross-Complainant and Cross-Defendant, FLOYD AUTEN ELECTRIC, INC. ("Auten"). Evidence, both oral and documentary, having been presented by all parties and the action having been argued and submitted for decision, and the Court having cause to be made and filed herein its written Statement of Decision,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. IBEW shall have Judgment and recover from Berry the sum of $34,365.00;

2. Berry shall have Judgment and recover from Auten the sum of $9,074.00 plus costs of suit in the sum of $1,143.70, for a total Judgment in the sum of $10,217.70; and,

3. The Cross-Complaint of Auten in Case Number RCV040207 is dismissed; the Complaint of Auten in Case Number RCV045577 is dismissed; and the Complaint of Auten in Case Number RCV051095 is dismissed.

DATED: May 20, 1992

J. Lewis Liesch
THE HONORABLE J. LEWIS LIESCH

APPENDIX "F"

CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA
FILED 6-17-96

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 440,

Plaintiff, Cross-Defendant and Respondent,

v.

BERRY CONSTRUCTION, COMPANY, INC.,

Defendant, Cross-Complainant, Cross-Defendant and Appellant,

FLOYD AUTEN ELECTRIC, INC., a California Corporation,

Cross-Defendant, Cross-Complainant and Appellant

OPINION

APPEAL from the Superior Court of San Bernardino County. J. Lewis Liesch, Judge. Affirmed.

Jacque Boyle for Cross-Defendant, Cross-Complainant and Appellant.

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exceptions of parts A.1., A.3, and B. through H.

Covington & Crowe, Robert F. Schauer and Melanie Fisch for Defendant, Cross-Complainant and Appellant.

Ray Van Der Nat for Plaintiff, Cross-defendant and Respondent.

FACTUAL BACKGROUND

In 1983, various associations of general contractors in Southern California ("Contractors") and various district councils and local unions affiliated with the United Brotherhood of Carpenters and Joiners of America ("Carpenters' Union") entered into a master labor agreement ("Contractors/Carpenters Agreement"). That agreement provides, inter alia, that no contractor shall subcontract any work except to a subcontractor which has a current labor agreement with an "appropriate union. Berry Construction, Inc. ("Berry"), general contractor, is bound by the terms of that agreement.

Thereafter, Berry was hired to construct an elementary school in La Quinta. Berry subcontracted with Floyd Auten Electric, Inc. ("Auten"), an electrical contractor, to perform the electrical portion of the job. the written agreement between Berry and Auten ("Subcontract") provides that Auten "agrees to have valid collective bargaining agreement with the appropriate building and construction trade unions or unions. AFL-CIO;...." Auten has an agreement with the National Association of Independent Unions, but not with any union affiliated with the AFL-CIO.

After Auten had begun work on the job, the Laborers' International Union of North America, a union affiliated with the AFL-CIO, complaint to Berry that Berry had

violated the Contractors/Carpenters Agreement by hiring Auten, because Auten did not

have a labor agreement with an "appropriate" union. Concerned that it may have liability either the laborers' union or to the International Brotherhood of Electrical Workers, Local Union No. 440 ("IBEW"), which is also affiliated with the AFL-CIO, Berry withheld the final payment due to Auten in the sum of $79,750. In addition, Berry asserted that various backcharges totaling $9,402 should be deducted from whatever it owed to Auten.

PROCEDURAL BACKGROUND

In 1986, the IBEW sued Berry for damages. It alleged that it was a third-party beneficiary of the Contractors/Carpenters Agreement and that Berry had breached that agreement by subcontracting electrical work to Auten. In 1987, Berry cross-complained against Auten,alleging that Auten had breached the Subcontract, and seeking damages, indemnity, and declaratory relief. Auten, in turn, cross-complained against the IBEW for damages for interference with contractual relations and for unfair labor practices. In a separate action filed in 1988, Auten sued Berry for the balance due under the Subcontract and for damages for alleged unfair trade practices and Cartwright Act violations. In January of 1990, the actions were consolidated.

Auten waived a jury in 1989. Its subsequent motion for relief from that waiver was denied. After certain issues were resolved by a ruling by Judge

Schaefer on a motion for summary adjudication, the case was tried before Judge Liesch. The Court found that Berry was liable to the IBEW in the sum of $34,365 and to Auten in the sum of $64,757. However, it also found that Auten should indemnify Berry for Berry's liability to the

IBEW, and should also reimburse Berry in the additional sum of $39,466, representing Berry's cost of defense of the action by the IBEW. The net result was that Auten owned [sic] Berry the sum of $9,074. Judgment was entered in favor of the IBEW and against Berry in the sum of $34,365, and in favor of Berry and against Auten in the sum of $10,217 ($9074 plus costs of suit). Auten's claims against Berry and the IBEW were dismissed.

Auten appeals. Berry cross-appeals.

CONTENTIONS

Auten complains generally (1) that the trial court abused its discretion by denying Auten's motion for relief from the jury trial waiver and that the error was prejudicial to Auten because the resulting nonjury trial was conducted by a biased judge. In support of its prejudice analysis, Auten asks that we permit it to augment the record with a reconstruction of an exhibit which has been lost.

Regarding that aspect of the judgment in favor of the IBEW and against Berry, which in turn forms of the basis of Berry's judgment against Auten, Auten contends (2) that the trial court erred in granting the IBEW's motion for summary

adjudication of issues against Berry, (3) that the IBEW failed to prove that it was damaged by Berry's breach of the agreement with the Carpenters' Union, and (4) that the IBEW's action against Berry is pre-empted by federal law.

As to its own claims against the IBEW for unfair trade practices, Auten argues (5) that the claims were erroneously dismissed by the trial court.

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Concerning Berry's claims against it, Auten Contends (6) that the trial Court Misconstrued the Subcontract, (7) that Berry's damages were not foreseeable, and that (8) that the trial court erred in concluding that Auten had not substantially complied with licensing agreements.

In its cross-appeal, Berry simply incorporates by reference Auten's arguments regarding the invalidity of the judgment against Berry and in favor of the IBEW.

DISCUSSION

A. AUTEN HAS FAILED TO ESTABLISH THAT THE TRIAL COURT PREJUDICIALLY ABUSED ITS DISCRETION BY DENYING AUTEN'S MOTION FOR RELIEF FROM ITS WAIVER OF JURY TRIAL.

Auten contends that the trial court prejudicially abused its discretion when it denied Auten's motion for relief from its earlier waiver of its right to a jury trial. It is mistaken.

In civil cases a well as criminal, "[t]rial by jury is an inviolate right and shall be secured to all...." (Cal.Const.,

art. 1,,,, §16.) However, in civil cases the right to "a jury may be waived by the consent of the parties expressed as prescribed by statute." (Ibid.)

The statutory means by which a jury may be waived in a civil case include a "written consent filed with the clerk ...." (Code Civ. Proc., § 631, subd. (a)(2).) In May of 1989, when Auten filed an at-issue memorandum in its action against Berry, it answered "no" to the question on the form which asked whether a jury trial was being

requested. That response constituted an express waiver of the right to a jury trial (March v. Pettis (1977) 66 Cal.App.3d 473, 476-477.) While the absence of a reporter's transcript renders it impossible to be sure, Auten may have waived a jury trial a second time in January of 1990 by failing to request it when the consolidated cases were first set for trial (Code Civ. Proc. §631, subd. (a)(4).)

"Waiver of jury is not, however, irrevocable." (Wharton v. Superior Court (1991) 231 Cal.App.3d 100, 103.) "The court may, in its discretion upon just terms," relieve a party from the effect of its waiver by allowing a trial by jury. (Code Civ. Proc. §631, subd. (d).) That is true whether the waiver is express, as in this case (e.g., Bishop v. Anderson (1980) 101 Cal.App.3d 821), or inadvertent, as when a party requests a jury trial but thereafter mistakenly fails to deposit jury fees in a timely fashion (e.g., Wharton).

Auten substituted in new counsel in March of 1990. In May of 1990, Auten moved pursuant to Code of Civil Procedure Section 631, subdivision (d), to set aside its prior waiver of jury trial. The motion was based on the grounds that Auten's prior counsel had waived a jury without its consent and that no one would be prejudiced by the relief being granted.

The motion was heard in June of 1990 but not ruled upon until July of 1991 after Auten brought the omission to the court's attention. Judge Schaefer then denied the motion for relief, explaining only that Auten's waiver was express rather than inadvertent. The case was tried by Judge Liesch later in 1991.

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1. Auten Did Not Waive its Contention that the Denial of its Motion for Relief was an Abuse of Discretion.

Before considering whether the trial court abused its discretion in refusing to relief Auten from the waiver of the right to a jury trial, we first decide whether Auten has waived any error.

a. Auten was not Required to Renew its Motion.

In Ferrea v. Chabot (1898) 121 Cal. 233, the plaintiff moved for relief from a prior express waiver of his right to a jury trial. His motion was denied. (Id., p. 235.) The case was ultimately tried before a judge other than that which had ruled on the motion, and the plaintiff appealed. (Id., pp. 234-235.) On appeal, the plaintiff asserted that the waiver was void for a reason different from that

which he had asserted in the unsuccessful motion in the trial court. A department of the Supreme Court held that the second judge would not have been bound by the ruling of the first judge, and that the plaintiff should have renewed his request for relief to the judge who was about to try his cases. Since he had not done so, the plaintiff had not "been denied his right to a jury trial." (Id., p. 236)

Glogau v. Hagan (1951) 107 Cal. App.2d 313 cites Ferrea to support its holding that a party who has waived a jury trial by failing to request it in time, and who thereafter moves unsuccessfully for relief from that waiver, waives the right to challenge that ruling on appeal if he or she fails to renew that request for relief to the trial judge. (Glogau, pp. 316-317.)

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Here, Auten concedes that it did not renew its request for relief by addressing a second motion to Judge Liesch. Were we to follow Glogau in applying Ferrea, we would be forced to conclude that Auten thereby waived its right to challenge Judge Schaefer's denial of its original motion.

For several reasons, we decline to join Glogau in applying Ferrea to thee facts. Preliminarily, we question whether Ferrea was correctly decided, because it inexplicably fails to account for former Civil Code section 182, which at the time prohibited the renewal of an application for an order which had already been

refused by another judge.[1] It would be anomalous to judicially create a rule that, in order to prevent a waiver, a party must make a second motion which the party is statutorily prohibited from making.

While former Civil Code Section 182 has been repealed, subsequent decisional law raises similar concerns. A rule requiring the renewal of the motion before a second judge makes sense only if the second judge can properly consider the renewed motion. Whatever the law may have been when Ferrea and Glogau were decided, more recent cases have established that the renewal of a previously denied motion should not be submitted to a different judge. If a party nevertheless does so, the "proper procedure ... is for the second

judge to direct the moving party to the judge who ruled on the first motion." (Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal.App.3d 122, 1232,

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[1] Former section 182 provided that "[i]f an application for an order, made to a Judge of a Court in which the action or proceeding is pending, is refused in whole or in part..., no subsequent application for the same order shall be made to any Court Commissioner, or any other Judge" unless "liberty to renew the same" was granted. (Stats. 1880, ch. 35, § 1, p. 43.) That section was repealed in 1933 when a less restrictive provision was enacted as Code of Civil Procedure section 1008. (Stats. 1933, ch. 743, § 61, p. 1835; id., ch. 744, § 177, p. 1898.)

accord, Curtin v. Koskey (1991) 231 Cal.App.3d 873, 877.) The second judge may consider the renewed motion only if the first judge is unavailable. (Curtin, p. 877, Ziller, p. 1232.)

Usually, therefore, a renewed motion would simply result in the motion being presented to the same judge who had already denied it. Neither Ferrea nor Glogau require a motion for a jury to be made twice to the same judge. Nor are we aware of any other authority requiring a party to engage in such a redundant act. To the contrary, the Supreme Court has held that once a written request for a jury trial had been made and denied, "it was not necessary for [the plaintiff] to repeat the demand" in order to preserve the issue for review on appeal.[2] (Swasey v. Adair (1891) 88 Cal. 179, 183.)

In any event, we find the procedure circumstances of this case distinguishable from those in Ferrea. The Ferrea court placed significance on the fact that the renewed motion would not have been based on the same ground as had been asserted in the original motion. Therefore, the decision in Ferrea can most easily be explained by the rule that arguments not asserted in the trial court cannot be raised for the first time on appeal. (Damiani v. Albert (1957 48 Cal.2d 15, 18; In re Joseph E. (1981) 124

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[2] Here, however, Judge Liesch would have been able to consider a renewed motion, because the first judge, Judge Schaefer, was unavailable, having disqualified himself at Auten's request pursuant to Code of Civil Procedure section 170.1.

Cal.App.3d 653. 657.) Here, by contrast the ground offered in the trial court in support of the motion for relief is the same as that argued on appeal in support of Auten's contention that Judge Schaefer abused his discretion.

We conclude that, even though Auten did not renew its Motion for relief before Judge Liesch, Auten did not waive its contention that Judge Schaefer had abused his discretion when denying Auten's motion.

b. **Auten is Deemed to Have Excepted to the Denial of Its Motion.**

Berry has also argued that Auten is barred from challenging the denial of its motion for relief because it failed to formally take an exception to that denial, as required by Glogau v. Hagan, supra 107 Cal.App.2d at page 316. It is mistaken. Glogau was decided before Code of Civil Procedure section 647 was amended in 1953 to provide that an exception to a ruling is deemed to have been made "[i]f the party, at the time when the order, ruling, action or decision is sought or made, or within a reasonable time thereafter, makes known his position thereon, by objection or otherwise. ..."

Here, Auten made its position known when the ruling was sought, through its written motion. In addition, 10 days after the ruling was issued, Auten made its position known again by filing a petition for an extraordinary writ, which sought to overturn that ruling.[3] (We take judicial

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[3] While this court summarily denied that petition, we are free to re-examine the issue on appeal. "[T]he

notice of the petition in this case no. E009775.) Both of those

methods result in a deemed exception (Code of Civ. Proc., § 647.) Thus, the lack of a formal exception does not bar Auten from contesting the denial of its motion for relief on appeal.

2. A Trial Court's Erroneous Denial of a Request for Relief from Waiver of Jury Trial Does Not Justify the Reversal of the Judgment Resulting from The Subsequent Nonjury Trial Unless the Appellant Was Actually Prejudiced by the Absence of a Jury.

"Because the matter is one addressed to the discretion of the trial court, that court's denial of a request for relief of jury waiver cannot be reversed in the absence of proof of abuse of discretion." (Gonzales v. Nork (1978) 20 Cal.3d 500, 507.) The issue is not whether we would have reached the same conclusion as the trial court did. (Id., pp. 510-511.) Thus, the decision will not be set aside so long as there is a reasonable or even fairly debatable justification for the action taken. (Id., p. 507).

That standard of review is easily stated. The more difficult question is, what are the "relevant considerations"

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denial of a writ petition does not establish law of the case unless denial is accompanied by a written opinion following the issuance of an alternative writ." (Kowis v. Howard (1992) 3 Cal.4th 888, 891.)

which guide a trial court's decision? And if a trial court abuses its discretion by denying a motion for relief, when is that erroneous ruling prejudicial, justifying reversal?

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While prior cases have not expressly acknowledged the distinction, those two questions have been answered differently depending on the state of the proceedings at which appellate review is sought. One set of answers has been given when the appellate court is ruling on a petition for extraordinary relief while the action is still pending in the trial court. When the order denying relief is being reviewed in the course of an appeal from a judgment following trial, a different set of answers governs.

When no trial has yet occurred, and a writ of mandate is requested to force the trial court to grant the petitioner relief from a waiver of the right to jury trial, appellate courts have held that the existence of prejudice is the determining factor, at least when the waiver was inadvertent: "Where the right to jury is threatened, the crucial focus is whether any prejudice will be suffered by any party or the court if a motion for relief from waiver is granted." (Wharton v. Superior Court, supra, 231 Cal.App.3d at p. 104.) If a trial court denies relief from an inadvertent waiver where there has been no showing of prejudice either to the other party or to the court, it has prejudicially abused its discretion as a matter of law. (Ibid.; Winston v. Superior court (1987) 196 Cal.App.3d 600, 602; Byram v. Superior Court (1977) 74 Cal.App.3 In concluding that the relief should be

denied only in the event of prejudice, those cases have emphasized that the right to trial by jury is "an inviolate right secured to all" by our Constitution. (Cal. Const., art. I, §16.) As "a basic and fundamental part of our system of jurisprudence," that right "should be zealously guarded by the courts [citation]. In case of doubt therefore, the issue should be resolved in favor of preserving a litigant's

right to a jury." (Byram, supra 74 Cal.App.3d at p. 654; accord, Wharton, supra p. 103.)

While the precise reasoning is questionable,[4] the result is no doubt sound. As the Supreme Court said long ago, "as a general rule, a party should be relieved from [even an express waiver of] a jury, where the same can be done without injury to the other side, and without disarranging the orderly conduct of the business of the court." (Ferrea v. Chabot, supra, 121 Cal. at p. 235.)

However, after a trial has already occurred, the issue is no longer merely

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[4] The emphasis on the existence of a constitutional right to a jury trial is somewhat misleading. As we see it, that right is extinguished by a waiver. Thereafter, there is only a statutory right to seek relief from that waiver. While the trial court's exercise of its discretion in ruling on that request should be guided by the constitutionally-based public policy in favor of jury trials, there is no constitutional right to relief.

whether the case should be trial before a jury. Instead, it is whether a second trial should be conducted so that a jury can retry a case which has already been tried by a judge. Under those circumstances, the absence of prejudice to the other parties and to the court, while still relevant, is no longer the sole consideration. The other factors to be considered include: (1) Was the waiver intentional or inadvertent? If Intentional, was there good reason for later seeking relief from that decision? For instance, was the request for a jury motivated by a significant change in circumstances, a change only in tactics, or merely a desire to gain a continuance or some other collateral advantage? (2) Was the request for relief made promptly? If not, was the delay excusable? (3) Did the moving party

demonstrate that it was likely to suffer prejudice if relief were denied? (Cf. Gonzales v. Nork, supra, 20 Cal.3d at pp. 507-511; Day v. Rosenthal (1985) 170 Cal.App.3d 1125, 1176-1177; Byram v. Superior Court, supra, 74 Cal.App.3d at pp. 653-654.)

Even if these factors suggest that the trial Court's denial of relief was an abuse of discretion, that error is not necessarily reversible. An utterly arbitrary and erroneous decision, might also be utterly harmless. Generally, our power to reverse the trial court is limited to those errors which are prejudicial. (Cal. Const., art. VI, 13; Code Civ. Proc., §475.) Thus, a trial court's erroneous denial of a request for relief from waiver

does not require the reversal of the judgment resulting from the subsequent nonjury trial unless there is a showing that the appellant was actually prejudiced by the lack of a jury.[5] (McIntosh v. Bowman (1984) 151 Cal.App.3d 357, 363.)

Establishing such prejudice after a trial to the court is usually difficult (Byram v. Superior Court, supra, 74 Cal.App.3d at p. 654) because "[p]rejudice by a nonjury trial cannot be presumed; on the contrary, it is presumed that the party had the benefit of a fair and impartial trial" (McIntosh v. Bowman, supra, p. 363). The lack of group deliberation,

by itself, does not justify reversal. (Day v. Rosenthal, supra, p. 1178.) As explained below, Auten fails to demonstrate prejudice.

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[5] Two cases apply the rule from pretrial cases (i.e., that the "'denial of a jury trial after waiver where no prejudice is shown to the other party or to the court is prejudicial'") in the posttrial context. (Simmons v. Prudential Ins. Co. (1981) 123 Cal.App.3d 833, 838-839, quoting from Bishop v. Anderson, supra, 101 Cal.App. 3d at p. 825.) To the extent that Simmons and Bishop suggest that the trial court's erroneous failure to grant relief from waiver requires reversal of the subsequent judgment without any consideration of whether the moving party was actually prejudiced by the lack of a jury, they are contrary to the weight of authority and we decline to follow them.

3. Auten Cannot Demonstrate Actual Prejudice Because It Waived its Claim That the Trial Judge was Biased.

Auten emphasizes the absence of any evidence that either Berry or the Court would have been prejudiced had the motion for relief been granted. As explained above, however, the critical question regarding prejudice in this procedural circumstance is whether Auten suffered actual prejudice from going to trial in front of a judge rather than a jury. Auten's answer to that question is to assert that it was harmed because (1) Judge Schaefer was biased against it; (2) Judge Schaefer communicated his bias to Judge Liesch, the judge who trial the case; (3) as a result, Judge Liesch became biased against Auten; and (4) his bias caused him to render an erroneous judgment adverse to Auten. As we will explain, its claim of prejudice is untenable.

a. Factual Background

Judge Schaefer presided over a settlement conference in March of 1990. At the conclusion of that conference, Judge Schaefer became angry with Auten because Auten refused to settle on the terms being proposed. Thereafter, he instructed his clerk to write a note for him, to place it in an envelope addressed to the "'Trial Judge,'" and to put the envelope in the trial court file. As to the content of the note, the clerk recalled only that it "stated, in substance, that the plaintiff had made a very fair offer and that defendant Auten had refused to settle."

Thereafter, a sealed envelope in the court filed marked "Note to Trial Judge" was noticed by an employee of Auten's counsel when she was making copies of the documents from the file. Through the envelope, she was able to make out the following message: "Judge Schaefer held MSC & feels [symbol for plaintiff] made a very reasonable offer to settle -- [symbol for Defendant] (Auten Elec) refused to settle. [¶] Ct feels this [symbol for plaintiff] could not get approx $60,000."

In November of 1991, the case was assigned for trial before Judge Schaefer. Auten moved to disqualify Judge Schaefer pursuant to Code of Civil Procedure section 170.1, subdivision (a)(6)(C), on several grounds, including the belief that Judge Schaefer had written a letter to the trial judge, advising him or her that in his opinion a judgment against Auten would be appropriate.

In the course of the hearing of that motion, the envelope and the note were marked as an Exhibit. Auten's request that Judge Schaefer open the envelope and read the note into the record was refused, but Judge Schaefer did consent to the disqualification.

That same day, the matter was assigned to Judge Liesch and trial commenced. At that time, Auten made no reference to the note from Judge Schaefer, either to inquire whether Judge Liesch had read it or to advise Judge Liesch not to do so. Nor was any objection raised to Judge Liesch's impartiality. To the contrary, after Judge Liesch had disclosed that he was a former neighbor of a former principal of Berry, Auten declared that it was satisfied that Judge Liesch would be

"fair and impartial."

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In the course of the instant appeal, Auten has asked that Judge Schaefer's note to the trial judge be included as part of the record on appeal. However, the trial court has been unable to locate that exhibit.[6] There is no evidence to indicate whether Judge Liesch ever read the note prior to its disappearance.

b. Auten Waived its Claim of Bias.

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[6] Auten subsequently moved this court for leave to augment the record on appeal with a reconstructed version of the note in accordance with the declarations of Judge Schaefer's clerk and Auten's counsel's employee. In order to bolster its argument that Judge Liesch was a close friend of Judge Schaefer, to whom Judge Schaefer probably would have communicated his bias against Auten, Auten also requested that this court take judicial notice of certain documents demonstrating that Judge Liesch endorsed and contributed to Judge Schaefer in Schaefer's subsequent unsuccessful election to retain his seat on the bench.

As we will explain, however, even if the facts are as represented by Auten, its claim of bias by Judge Liesch has been waived. As a result, both the existence and content of the note and the nature of the relationship between Judges Schaefer and Liesch have become moot. The motion to augment and the requests for judicial notice are therefore denied.

Berry contends that Auten's claim of bias is entirely speculative, because there is no evidence that Judge Liesch ever read the note from Judge Schaefer. We tend to agree; however, we need not address the issue on the merits, because Auten has waived its claim that Judge Liesch was biased.

A party who becomes aware of misconduct prior to or during the course of proceedings should not be able to speculate on the chance of obtaining a favorable outcome by remaining silent, while at the same time preserving his or her objection in the event the judgment is adverse. (Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal.3d 98, 103 [misconduct by jurors]. To prevent such speculation, the "well settled"

rule is that if a party "becomes aware of facts constituting misconduct or irregularity in the proceedings ..., he must promptly bring such matters to the attention of the court, if he desires to object to it, or he will be deemed to have waived the point as a ground for a motion for a new trial." (Ibid.) For the same reason, claims of misconduct may not be urged for the first time on appeal where the prejudice created thereby could have been but was not prevented or cured by timely objection in the trial court. (Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 796-797 [misconduct by counsel].)

The same rule applies in the event of judicial misconduct. Upon learning of facts suggesting that the assigned trial judge is not impartial, a party must move at the earliest practicable opportunity

either to disqualify the judge or to obtain a mistrial; otherwise, it is waived. (Schrader Iron Works, Inc. v. Lee (1972) 26 Cal.App.3d 621, 641; Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal.App.3d 143, 150; Gimbel v. Laramie (1960) 181 Cal.App.2d 77, 85-86.)

Here, Auten knew of the existence of the note, the manner in which it was addressed, its contents, and its location, before being assigned to Judge Liesch for trial. Nevertheless, Auten neither moved to disqualify Liesch on the basis of the note nor inquired of Liesch to determine if there were grounds to do so. Having failed to act to prevent the prejudice claimed to have been created by the improper note, Auten waived whatever objection it may have had.

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Since Auten has waived its claim of bias on the part of the trial judge, and demonstrates no other actual prejudice, it has failed to establish that the trial court's erroneous denial of its motion for relief justifies the reversal of the subsequent judgment.

B. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE IBEW WAS THE THIRD PARTY BENEFICIARY OF THE CONTRACTORS/ CARPENTERS AGREEMENT.

In response to a motion by the IBEW for summary judgment or summary adjudication of issues, Judge Schaefer granted the motion for summary adjudication in part, finding that there was not triable issue as to the following five issues: (1) Berry was bound by the Contractors/Carpenters Agreement. (2)

Berry was the general contractor for the construction of the school on the La Quinta job site. (3) The Contractors/ Carpenters Agreement "obligated Berry to subcontract electrical installation work to an electrical subcontractor signatory to [the IBEW] when electrical construction work was to be performed on the job site." (4) "Berry breached its agreement with the Carpenters when it subcontracted electrical construction work on the job site to Floyd Auten Electric, Inc." (5) The IBEW was the intended third party beneficiary of the Contractors/Carpenters Agreement, "specifically the subcontracting clause as it related to electrical construction work to be performed at the job site."

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Auten contends that the trial court erred in granting the motion for summary adjudication as to each of those five issues.[7]

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[7] Auten also contends that Judge Schaefer's alleged bias against Auten tainted his ruling on the motion for summary adjudication of issues. However, a ruling on a motion for summary adjudication of issues does not involve an exercise of either discretion or fact-finding. Even if it did, our review of such a ruling is de novo, without deferring to the decision of the trial court. Since our sole concern is whether the decision is correct as a matter of law, we need not consider the cause of any error. In particular, the possibility that the decision was improperly influenced by bias against one of the parties is irrelevant. Thus, the alleged bias of Judgment Schaefer need not be decided.

1. Auten has Waived Its Claim of Error as to the First Four Issues.

As to the first four issues, rather than explain why it believes the trial court to have erred, Auten merely cites to the moving and opposing papers filed in the trial court, asks us to review those papers, and concludes that such a review "clearly demonstrates the lower Court's prejudicial error. ..."

"Such extreme inadequacy of the briefs evidences a misconception of the respective duties of counsel and the courts." (Estate of Good (1956) 146 Cal.App.2d 704, 706.) As an appellant, Auten has the burden to affirmatively demonstrate in its brief the existence of an error in the judgment. (People v. Justice (1959) 167 Cal.App.2d 616, 618.) Such a demonstration involves more than simply stating the bare assertation that one or another portion of the judgment is erroneous, and leaving it to the court to figure out why. It is not the court's rule to construct theories or arguments which would undermine the judgment. (People v. Stanley (1995) 10 Cal.4th 764, 793.) Instead, "'it is incumbent upon an appellant to present argument and authority on each point made.'" (In re

Marriage of Ananeh-Firempong (1990) 219 Cal.App.3d 272, 278, quoting from County of Sacramento v. Lackner (1979) 97 Cal.App.3d 596, 591.) When counsel asserts a point but fails to support it with reasoned argument and citations to authority, the court may deem it to be waived, and pass it without consideration. (Stanley, p. 793; People ex rel. Dept. of

Public Works v. Garden Grove Farms (1965) 231 Cal.App.2d 666, 674.)

The rule is the same even when the decision of the trial court is reviewed de novo on appeal. (Kim v. Sumitomo Bank (1993) 17 Cal.App.4th 974, 979 [summary judgment]; Dills v. Redwoods Associates, Ltd. (1994) 28 Cal.App.4th 888, 890, fn. 1 [demurrer].) We review the trial court's decision independently, but only concerning the issues which have been adequately raised and supported in appellant's brief.

Here, as to all but one issue, Auten has simply incorporated by reference the arguments filed below in opposition to the motion for summary adjudication. That reference is improper and the arguments referred to may be disregarded. "no authorities or argument may be incorporated by reference from another document" into a petition for review by the Supreme Court. (Cal.Rules of Court, rule 28(e)(5).) The same rule applies to briefs filed in the Courts of Appeal. (Balesteri v. Holler (1978) 87 Cal.App.3d 717,721.) Accordingly, an appellate court need not consider any argument which, rather than being fully presented in an appellate brief, is merely incorporated by reference to papers filed in the trial court. (Biljac Associates v. First Interstate Bank (1990) 218 Cal.App.3d 1410, 1422.) Auten's claims of error as those four issues are therefore waived.

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2. The IBEW Established that it Was the Third-Party Beneficiary of the Contractors/Carpenters Agreement.

As to the fifth issue, concerning

the IBEW's status as a third-party beneficiary of the Contractors/Carpenters Agreement, Auten contends that the IBEW was not shown to be an intended beneficiary of the contract, and that parol evidence was improperly admitted to prove such intent. Since Auten does not rely exclusively on improper incorporation by reference to support those two arguments, we will address them.

"A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." (Civ. Code, §1559.) For a person to have a right to enforce a contract to which he or she was not a party, the contracting parties must have intended the contract to benefit that person. (Jones v. Aetna Casualty & Surety Co. (1994) 26 Cal.App.4th 1717, 1724.) Others who may incidentally benefit from the performance of the contract may not enforce it. (Lucas v. Hamm (1961) 56 Cal.2d 583, 590; Kalmanovitz v. Bitting (1996) 43 Cal.App.4th 311, 314.) Whether the contracting parties intended to benefit a particular person is a question of contractual interpretation. (Walters v. Marler (1'978) 83 Cal.App.3d 1, 32.) When interpreting a contract, we give effect, not the parties' unexpressed subjective intent, but only to their intent as expressed contract, (Civ. Code, 1639). Accordingly, the intent to benefit a person must appear from the terms of the contract, read as a whole in light of the circumstances under which it was made.

(Jones, p. 1724; Walters p. 32.)

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Our review of the Contractors/Carpenters Agreement leads us to conclude that its terms do reveal an intent to benefit unions such as the IBEW.

That intent is not, however, expressed in the statement of purpose with which the agreement is prefaced. That statement refers (1) to the desire of the Contractors to obtain skilled workers in sufficient number to allow them to complete their work, (2) to the intention to achieve uniformity in compensation and working conditions "for the employees covered by" the agreement, (3) to the intention to establish a procedure to resolve grievances between the Contractors and their employees, and (4) to the need to assure the "competitive position" of the parties to the agreement. Thus, the first purpose is to advance the interests of the Contractors, the third to benefit the Contractors nd their employees, and the fourth to benefit the parties.

Nor does the reference in the second enumerated purpose to "employees covered by" the agreement include the members of the IBEW. The Contractors/Carpenters Agreement defines an employee to be a person who is "working in the craft jurisdiction covered by" the agreement. While the territorial jurisdiction covered by the agreement is defined to consist of specified counties in southern California, including Riverside County, the craft jurisdiction is not defined, except as being "all work falling within the recognized jurisdiction" of the carpenters' union. We doubt that electricians belonging to

the IBEW would be employed to perform work falling within the recognized jurisdiction of the carpenters' union. Certainly, the IBEW did not establish that fact in its motion for

summary adjudication. Thus, we must look elsewhere in the Contractors/ Carpenters Agreement for evidence of an intent to benefit the electricians' union.

The portion of the agreement which limits a contractor's freedom to select subcontractors is prefaced by a separate statement of intent: "The purposes of this Article are [1] to preserve and protect the work opportunities normally available to employees and workmen covered by this Agreement, [2] maintenance and protection of standards and benefits of employees, employed hereunder, from being compelled to work with non-union workmen." (numbering added.) by itself, that portion of the agreement also fails to express an intent to benefit the IBEW.

The first of these three purposes expressly states that the agreement is intended to benefit the "employees and workmen covered by" the agreement. As noted above, the coverage of the agreement depends upon the scope of the craft jurisdiction of the carpenters' union. Without evidence that IBEW members perform work within the craft jurisdiction of the carpenters' union, we cannot say that the members of the IBEW are "covered" by the agreement. If not, then this language does not indicate an intent to benefit the IBEW.

Nor does the third purpose, which refers to the rights of "Union" employees, suggest an intent to benefit the IBEW. "Union" is specifically defined in the agreement to mean "the District Councils, and Local Unions in Southern California affiliated with

the United Brotherhood of Carpenters and Joiners of America. . . ." There is no evidence that the IBEW falls into that category.

That leaves only the second statement of purpose, which refers generally to the negotiated benefits of "employees and workmen..." We decline to read that as a reference to all members of all unions. Instead, it is most reasonably construed as meaning members of the Carpenters' Union, whose benefits had just been negotiated and memorialized in the Contractors/Carpenters Agreement. Once again, the language does not refer to the IBEW or its members.

Nevertheless, other paragraphs of the Contractors/Carpenters Agreement do suggest a broader class of intended beneficiaries. Paragraph 503 provides, inter alia, that no contractor shall "subcontract any work to be done at the site of construction ... coming within the jurisdiction of the Carpenters, Cement Masons, Laborers, Operating Engineers, Teamsters or Ironworkers except to a person, firm or corporation party to an appropriate [sic] current labor agreement with the appropriate Local Union or Council of the Carpenters, Cement Masons, Laborers, Operating Enginers [sic], the International Brotherhood of Teamsters or Iron workers...."

Paragraph 503.1 then goes on to say that, if the contract price is over a certain threshold, "the Unions enumerated in Paragraph 503 will be expanded to include any subtrade Union whose wage and fringe benefit costs are no higher than $25.87 per hour."

The IBEW contends that it is a subtrade union as that term is used in paragraph 503.1, and that that paragraph demonstrates an intent to benefit the IBEW. That

argument depends upon the meaning of "subtrade Union", a term which is not defined in the Contractors/Carpenters Agreement. In support of its motion for summary adjudication, the IBEW presented evidence that those who negotiated the agreement "used the term 'subtrade unions' to mean any ... AFL-CIO, Building and Construction Trades Council affiliate, not listed in section 503." As Auten has not cited either to any evidence submitted to Judge Schaefer that contradicts that definition or to any ruling on any objection to the consideration of that evidence, we must accept that definition as correct.

Given that definition of a subtrade union, paragraph 503.1 does suggest an intent to benefit the IBEW and its members. Therefore the trial court did not err by ruling that that issue was established as a matter of law.

C. THE DAMAGES AWARDED TO THE IBEW WERE NOT SPECULATIVE.

The damages for which Berry was found liable to the IBEW, and for which

Auten was in turn obligated to reimburse Berry, were measured by the payments which a union subcontractor would have made for its workers' retirement, medical insurance, and other fringe benefits. Auten attacks that award of damages as being "entirely speculative, uncertain and conjectural." The exact nature of his attack is unclear, but appears to be two-fold.

First, Auten complains that there was no evidence that an electrical contractor with an agreement with the IBEW would have bid on the job and that, assuming such a

contractor was available, would have bid, and would have received the subcontract, there is no evidence that the employees of such a contractor would have actually received the fringe benefits. In substance, Auten is claiming that the damages are not supported by the evidence and are therefore excessive. However, "'[t]he point that damages are excessive cannot be raised for the first time on appeal, but must be presented to the lower court on the motion for new trial.' Consequently [Auten], having failed to move for a new trial, cannot now contend that the award of damages is excessive." (Schroeder v. Auto Driveaway Co. (1974) 11 Cal.3d 908, 918, quoting from Bate v. Jolin (1929) 206 Cal. 504, 508. fns. omitted.)

By arguing that the IBEW should have been limited to recovering some administrative costs, Auten also appears to be claiming that the trial court employed the incorrect measure of damages. Such a claim may be raised despite the failure to move for a new trial. (Christiansen v.

Roddy (1986) 186 Cal.App.3d 780, 789.)

If the various contributions toward fringe benefits are paid by union electrical contractors to some entity other than the IBEW, the measure of damages used by the trial court may be incorrect. However, the burden of demonstrating such an error is on Auten, and it has failed to carry that burden. Specifically, Auten has failed to cite to any facts which would show that the payments in question would not have gone to the IBEW. In the absence of such evidence, we cannot determine that the trial court's measure of damages is erroneous.

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D. THE IBEW'S CLAIM IS NO PREEMPTED.

Auten argues that the IBEW's claim against Berry is not within the trial court's subject matter jurisdiction, but rather is within the exclusive jurisdiction of the National Labor Relations Board. It is mistaken.

As defined by the National Labor Relations Act, an employer commits an "unfair labor practice" by interfering with, restraining, or coercing employees in the exercise of their rights to organize, bargain collectively, or otherwise engage in concerted action for the purpose of collective bargaining or other mutual aid and protection. (29 U.S.C. § § 157, 158, subd. (a) (1).) As a general rule, both state and federal courts must defer to the exclusive jurisdiction of the NLRB over claims which arguably involve unfair labor practices. (San Diego Unions v. Garmon (1959) 359 U.S. 236, 245 [3 L.Ed.2d 775,

783]; Rodriguez v. Yellow Cab Cooperative, Inc. (1988) 206 Cal.App.3d 668, 674.)

However, there are limitations to that general rule. The preemption rule will not be applied unless there is a realistic threat that concurrent jurisdiction would interfere with the federal regulatory scheme. (Farmer v. Carpenters (1977) 430 U.S. 290, 305 [51 L.Ed.2d 338, 353]; Rodriguez p. 677.) Thus, "'[t]he critical inquiry ... is not whether the State is enforcing a law relating to labor relations or one of general application but whether the controversy presented to the state court is identical to ... or different from ... that which could have been ... presented to the [NLRB].'" (Rodriguez, p. 677, quoting Sears, Roebuck & Co. v. Carpenters (1978) 436 U.S. 180, 197 [56 L.Ed.2d 209, 225].)

Auten argues that such a threat of interference is presented here, and thus the general rule of preemption applies. We disagree. The IBEW's claim against Berry did not concern any disputed and potentially unfair practices. Instead, it principally revolved around a simple issue of contract interpretation. That issue has not been shown to be identical to one which would have been presented to the NLRB, nor do we discern any realistic threat of interference with the NLRB by the litigation of that issue in state court. Therefore, the IBEW's claim was not preempted.

E. AUTEN'S CLAIM THAT THE IBEW VIOLATED THE SHERMAN ANTITRUST ACT AND THE CARTWRIGHT ACT WERE WAIVED BY THE FAILURE TO PLEAD OR OTHERWISE RAISE THAT CLAIM IN

THE TRIAL COURT.

In its cross-complaint against the IBEW, Auten alleged that by attempting to enforce the Contractors/Carpenters Agreement, the IBEW had committed unfair labor practices proscribed by the Federal Labor Relations Act. (29 U.S.C. § 158, subd. (b)(4).) Its claims for both monetary and injunctive relief from those practices were dismissed after the trial court concluded that the IBEW's enforcement efforts were meritorious.

On appeal, Auten contends that the trial court erred in dismissing those claims. In asserting that alleged error, however, Auten ignores the NLRA, and instead appears to contend that it has proven facts which establish the IBEW's liability under the Sherman Antitrust Act (15 U.S.C. § 1) and the Cartwright Act (Bus. & Prof. Code, § 16700, et seq.). As the IBEW correctly points out, we need not consider that claim of error,

because Auten never alleged such liability in its trial court pleadings, and arguments not asserted in the trial court cannot be raised for the first time on appeal (Damiani v. Albert, supra 48 Cal.2d at p. 18; In re Joseph E., supra 124 Cal.App.3d at p. 657.) While Auten did assert liability under the Cartwright Act in its action against Berry, the IBEW was never named as a party to that action.

F. THE TRIAL COURT'S INTERPRETATION OF THE SUBCONTRACT IS CORRECT.

The Subcontract includes the following paragraph: "Subcontractor [Auten]

agrees to have [a] valid collective bargaining agreement with the appropriate building and construction trade union or unions. AFL-CIO; to abide by the same; to be found by the procedural rules and regulations and decisions of the National Joint Board for the Settlement of Jurisdictional Disputes; to pay all union fringe benefits; and to hold [Berry] harmless therefrom." The trial court interpreted that language to mean that Auten Was required to have a collective bargaining agreement with a union affiliated with the AFL-CIO. We agree.

Contracts are to be interpreted in a manner which will give effect to the mutual intention of the parties. (Civ. Code, 1636.) If possible, that intent is to be determined from the language of the contract. (Id., § 1639.) In deciding the intent of this paragraph, Auten would have us ignore the reference to the AFL-CIO. We cannot. When analyzing contractual language, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

(Id., § 1641; accord, Code Civ. Proc., §1858.) Our construction must strive to give effect, "'not only to every clause but to every word in it, so that no clause or word may become redundant..."' (Wagner v. Shapona (1954) 123 Cal.App.2d 451, 461, quoting from Hyatt v. Allen (1880) 54 Cal. 353, 358-359.)

Reading this paragraph of the Subcontract as a whole demonstrates that the period after the words "unions" was a

typographical mistake, since the list of the things to which Auten agreed continues for several additional lines of text. When that improperly inserted period is omitted it appears that "AFL-CIO" is intended to modify "union or unions." The rather clear inference, which the trial court drew, is that the parties intended that the union or unions must be affiliated with the AFL-CIO.

In arguing that that inference is incorrect, Auten invokes the rule that any ambiguity should be interpreted against the party who caused the ambiguity to exist. (Civ. Code, § 1654.) Its reliance is misplaced. That rule is a "tie breaker" to be employed only when other rules of construction do not suggest the proper interpretation. (Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal.App.4th 576, 596.) Here, there is no tie of equally plausible interpretations to be broken.

Auten also contends that the Subcontract is a contract of adhesion, any ambiguities of which must be resolved against the dominant party. However, it cites no evidence to support its contention that the terms of the Subcontract were non-negotiable. To the contrary, the evidence supports the opposite conclusion. In the case of at least three prior

subcontracts with Berry executed on a slightly different form, Auten modified the comparable term by striking out the reference to the AFL-CIO.

Nor does the existence of these modifications to prior subcontracts, and the

logical inference that Berry was are that Auten did not have an agreement with a union affiliated with the AFL-CIO, necessarily lead to the conclusion that the reference to AFL-CIO may be ignored. While the circumstances under which a contract was made may be considered to help explain its terms (Civ. Code, § 1647), here those circumstances cut both ways. Where the prior subcontract modifications suggest that Berry knew that Auten did not have an agreement with the "right" union, they also indicate that Auten knew that it did not comply with the terms of the Subcontract unless those terms were modified. Since conflicting inferences can be drawn from those circumstances, they do not support the conclusion that the trial court's interpretation is wrong.

Finally, Auten's reliance upon evidence of the parties' subjective understanding of the paragraph is misplaced. The task of contractual interpretation is concerned with determining, not the subjective intent of the parties, but their intent as objectively expressed in the terms of the contract. Thus, while parol evidence may be considered to explain the meaning of the words used, evidence relating solely to the parties' subjective understanding is irrelevant. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 684, p. 617.)

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G. BERRY'S DAMAGES WERE FORESEEABLE.

Auten claims that it should not be liable for the damages owed by Berry to the IBEW, because they were not reasonably foreseeable at the time the Subcontract

In the Subcontract, Auten "agrees to furnish all ... labor ... as prescribed by any governing authority and/or union agreement binding Contractor for the work to be performed under this Agreement, all of the documents being referred to herein as the contract documents and are incorporated herein by reference, made a part thereof [sic] and are binding upon Subcontractor. Subcontractor acknowledges that he as read and reviewed all of the contract documents and is familiar with them." Thus, Auten admitted to having read the Contractors/Carpenters Agreement.

As described in part B above, Berry was prohibited by the Contractors/ Carpenters Agreement from subcontracting with any company that did not have a labor agreement with the appropriate subtrade union. While the definition of "subtrade union" may not have been clear to Auten, any uncertainty was largely resolved by that portion of the Subcontract which requires Auten to agree to have a collective bargaining agreement with a union affiliated with the AFL-CIO and to make all fringe benefit payments required by that agreement.

Moreover, the same paragraph of the Subcontract obligates Auten to hold Berry harmless for any failure by Auten to pay those fringe benefits or to otherwise comply with the collective bargaining agreement with the appropriate union.

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In light of these contractual provisions, it was reasonably foreseeable at the time of the Subcontract that a failure by Auten to have an agreement with an AFL-CIO union and to pay the fringe benefits

required by such an agreement would subject Berry to liability for those fringe benefits.

H. THE ISSUE OF WHETHER AUTEN SUBSTANTIALLY COMPLIED WITH THE LICENSING REQUIREMENT IS MOOT.

As an alternative reason for entering judgment in favor of Berry and against Auten, the trial court found that Auten had not complied, or substantially complied with the statutory requirement that all contractors be licensed. (Bus. & Prof. Code, § 7031.) Auten contends that the trial court erred in making that finding. However, since we have found no error in the trial court's primary finding that Auten cannot collect on the balance of its contract price because it is liable to indemnify Berry for damages owed to the IBEW, we need not decide whether the trial court's alternative finding is also correct.

DISPOSITION

The judgment is affirmed. With respect to Auten's appeal, Berry shall recover its costs on appeal, including reasonable attorney's fees as provided by the Subcontract. The

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IBEW shall recover the costs incurred by it defending against Auten's appeal and Berry's cross-appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

McKINSTER
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.

APPENDIX "G"

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO STATE OF CALIFORNIA

FILED JUL 10 1996

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 440,	)
Plaintiff, Cross-Defendant and Respondent,	)
v.	)
BERRY CONSTRUCTION, COMPANY, INC.,	)
Defendant, Cross-Complainant, Cross-Defendant and Appellant,	)
FLOYD AUTEN ELECTRIC, INC., a California Corporation,	)
Cross-Defendant, Cross-Complainant and Appellant	)

E011508
(Super. Ct. Nos. RCV40207
RCV45577, RCV51095)

THE COURT:

Cross-defendant, Cross-complainant and Appellant's petition for rehearing is DENIED.

McKINSTER
Acting Presiding Justice

APPENDIX "H"

Fourth Appellate District, Division Two
No. E011508/E011510
S055156

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED OCT 17 1996
Robert Wandruff, Clerk

Deputy

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Respondent

vs.

BERRY CONSTRUCTION COMPANY, INC., Appellant

FLOYD AUTEN ELECTRICAL, INC. Appellant
and companion case

Appellant's petition for review DENIED.

Mosk, J., Kennard, J. and Chin, J. are of the opinion the petition should be granted.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal, filed June 17, 1996. (Cal. Const., art. VI, section 14, rule 976, Cal. Rules of Court.)

GEORGE
Chief Justice